

Christopher, Anne

From: Bellovary, Chris
Sent: Tuesday, July 01, 2014 5:35 PM
To: Horwitz, Benjamin
Cc: Christopher, Anne; Contreras, Peter
Subject: UST: Cold Regions Test Center; Soldotna Y Chevron

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Ben,

In regards to your questions about 40 CFR § 280.22.

- 1) Are violations of 40 CFR § 280.22 barred by the statute of limitations?

Short answer: No.*

Detailed answer: Part of the reason I needed to look at the text of § 280.22 was because poorly worded regulations are out there, including this one. § 280.22(a) states:

“Any owner who brings an underground storage tank system into use after May 8, 1986, must within 30 days of bringing such tank into use, submit, in the form prescribed in appendix I of this part, a notice of existence of such tank system to the state or local agency or department designated in appendix II of this part to receive such notice.”

The UST regulations fall under the general five year statute of limitations, stated in 28 USC § 2462. Since the USTs were installed in 1989, strictly read, the violation of failing to register the tanks occurred 25 years ago, well outside the five year statute of limitations period. There are a number of legal theories which can work to salvage a claim that would otherwise be time barred due to the statute of limitations (e.g., the discovery rule, discrete violations, continuing violations).

Fortunately, the Fourth Circuit Court of Appeals ruled on § 280.22 in Mayes v EPA back in 2008. They rejected EPA's argument that the time period for the statute of limitations did not start to accrue until the date in which the violation was discovered, but upheld the idea that § 280.22 created a continuing obligation of compliance, in which each period in which the Respondent failed to register their tanks was a new violation.

Note 1: The reason for the asterisk after “No”, above is because decisions from the Fourth Circuit Court of Appeals (based out of Richmond, VA) are not binding for courts in the Ninth Circuit, so there is a small amount of litigation risk.

- 2) For purposes of a field citation, can we cite a facility for a § 280.22 violation, if that violation was corrected before the inspection occurred?

Short answer: Probably not.

Detailed answer: Per a December 2003 OECA memo, titled “Use of Expedited Settlements to Support Appropriate Tool Selection,” violations eligible for expedited treatment under the SPCC Expedited Settlement Program must be witnessed by the inspector at the time of inspection” and “[v]iolations that do not require the violator to take some affirmative action, in addition to payment of a penalty, are not appropriate for an expedited settlement approach.”

Based on that text and similar passages, OECA does not to use Expedited Settlements for issues which were corrected prior to the inspection. It appears their concern is that they don't want us using quick settlement issues in a way that could make it look like we are just trying to make money for the government on issues in which the violator came into compliance on their own.

Note 1: We can deviate from what is stated in guidance. We should just save that for cases where the facts justify a different result. At the moment, I'm not seeing a unique fact scenario here that would argue we deviate from the guidance and pursue a violation that was previously corrected.

Note 2: The December 2003 OECA memo also states that the UST expedited settlement approach is for first-time violators with clear-cut violations that are relatively easy to correct. Fort Wainwright isn't a first time violator. That said, we just settled a fairly large UST case with Fort Wainwright, which we hope may change their compliance record in the future. This is also the first UST violation at the Cold Regions Test Center. So factors do exist which could support deviating from the "first time violators" provision, if that is how GWPU wants to proceed.

- 3) When a UST system has piping, which is run over to the other side of the facility and was later abandoned, should that piping run be treated as a UST system for purposes of 40 CFR Part 280, Subpart G?

Preliminary answer: Probably not.

The text in 40 CFR Part 280, Subpart G refers to UST systems, and refers to tanks, but does not refer to "pipes" or "piping." § 280.12 defines "UST system or Tank system [as] an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any." In the case of the Soldotna Y Chevron station, he has piping which was removed from service, but tank systems need to have a tank, and none of his tanks were removed from service. On a surface level, the text of the regulations indicate that removing a piping run from service, without removing the tank from service, probably does not trigger the provisions of 40 CFR Part 280, Subpart G.

This is in regards to a facility that appears to be headed towards formal, non-expedited enforcement, so if GWPU wants me to look into it further, I can see if there is any case law or guidance which indicates otherwise after it arrives on my desk.

Hopefully than answers your questions. If you want to discuss them further, just let me know. Thanks.

- Chris

Chris Bellovary
U.S. EPA - Region 10
Office of Regional Counsel
Direct Line: 206-553-2723

